VOON CHIN FATT v. PUBLIC PROSECUTOR

[A. Cr. J. (Spenser Wilkinson J.) March 8, 1949]

[K. L. — Criminal Appeal No. 3 of 1949]

Criminal Procedure Code (Cap. 6), ss. 140, 141 and 170 — Preliminary Enquiry — Admissibility of evidence — Delay in writing grounds of judgment.

The appellant in this case was jointly charged with another accused at the same preliminary inquiry with abduction and extortion alleged to have been committed in August 1945; and at the end of the inquiry the learned District Judge committed the other accused for trial before the High Court on the extortion charge. He, however, decided to try the appellant before himself on the charge of abduction under section 365 of the Penal Code. The evidence led at the preliminary inquiry was evidence admissible against one or the other of the two accused then before the Court but in this case the greater portion of the evidence given was evidence which, although admissible against the other accused with regard to the alleged extortion, was not admissible against the appellant upon any charge whatsoever. The appellant was convicted. On appeal, it was submitted *inter alia*, (i) that the joint trial of the appellant with the other accused at the preliminary inquiry was irregular and illegal and embarrassed his defence; (ii) that the long delay of two years in delivering the grounds of judgment was unsatisfactory and has prejudiced the appellant in his appeal.

Held: (1) the preliminary inquiry in this case was neither irregular nor illegal and neither was the course adopted by the learned District Judge illegal; (2) in view of the confusion between the admissible evidence and the inadmissible evidence was not as unassailable as the learned District Judge appeared to have thought, and of the possibility of prejudice to the appellant through the long delay in writing the grounds of judgment, it is impossible for the conviction to stand.

Where at a joint preliminary inquiry it becomes necessary to commit one accused, it is more satisfactory to commit both together even though the charge against one is a less serious one.

Observations on writing grounds of decision.

MAGISTRATE'S CRIMINAL APPEAL.

M. S. Mahendran for the appellant.

A. M. I. Austin (D. P. P.) for the respondent.

Spenser Wilkinson J. : — At the conclusion of the hearing of this appeal I quashed the conviction and indicated that in view of the various points of importance raised by Counsel for the defence I would give my full reasons for this decision later. This I now proceed to do.

The appellant was arrested along with one Othman bin Kernawi on the 25th November, 1946, in connection with charges of abduction and extortion alleged to have been committed in August, 1945, at the Petaling Tin Mine.

The two accused came before the District Judge in Kuala Lumpur on a preliminary enquiry which was heard on the 3rd January, 1947, when the depositions of seven witnesses were taken. At the conclusion of the preliminary enquiry the learned District Judge acting under section 140 of the Criminal Procedure Code committed the accused for trial before the High Court on a charge of extorting $15,000 Japanese currency from one Murugan Vellupillai Kandiah by putting him in fear of death or grievous hurt to one Ramalingam on the 22nd August, 1945.

Under the same section of the Criminal Procedure Code the learned District Judge decided in respect of the appellant that in the words of the section "such person should be tried before himself" and he accordingly framed a charge against the appellant under section 365 of the Penal Code of abducting one Ramalingam on the 20th August, 1945, with intent to cause the said Ramalingam to be secretly and wrongfully confined. In accordance with this decision the appellant came before the learned District Judge for trial on the 31st January, 1947. Under sub-section (2) of section 140 already referred to it is not necessary to recall witnesses for the prosecution but the accused may require that any witness called for the prosecution may be recalled for further cross-examination. This provision was duly applied and one witness (Kandiah) was recalled and asked one or two questions by Counsel for the defence. The appellant was then called upon for his defence and after himself giving evidence on his behalf and calling two witnesses was convicted and sentenced to nine months' rigorous imprisonment.

The appellant immediately gave notice of appeal and on the same day, that notice of appeal having been given, the learned District Judge allowed bail in the sum of $4,500 which was found the next day. The appellant has been on bail, therefore, since the 1st day of February, 1947. Up till that day he had been in custody since his arrest. The petition of appeal was filed on the 9th February, 1949, and sets out four grounds of appeal. The first ground is that the joint trial of the appellant with the said Othman bin Kernawi at the preliminary enquiry was irregular and illegal and embarrassed the petitioner in his defence. I think there can be no doubt that the preliminary enquiry was neither irregular nor illegal; neither was the course adopted by the learned District Judge illegal. But the vital question which is raised by this ground of appeal is whether in the circumstances of this case the course which was adopted in fact prejudiced the appellant.

Although under the provisions of the Criminal Procedure Code (section 141) it is only at the conclusion of a preliminary enquiry that the Court has to frame a charge it is the practice for the prosecution to put forward charges at the commencement of the enquiry in order that the evidence led may be properly directed to the offence which it is alleged the accused has committed. In pursuance of this practice two charges against both the accused jointly were before the Court at the preliminary enquiry and were as follows:—

1. That you on or about the 20.8.45 at Petaling abducted one Ramalingam chief clerk of Petaling Tin Mine with intent to cause the said Ramalingam to be secretly and wrongfully confined and thereby committed an offence punishable under s. 365 of the Penal Code Cap. 45.

2. That you on or about 22.8.45 at Petaling committed extortion by putting one Ramalingam in fear of death or grievious hurt and thereby dishonestly induced the said Ramalingam to deliver to you $15,000 Japanese currency and one cow and that you thereby committed an offence punishable under s. 387 of the Penal Code Cap. 45.

There is, in my view, no doubt that under the provisions of section 170 of the Criminal Procedure Code the appellant and the other accused could properly be tried together at one trial in respect of these two charges and if need be in respect of one of these charges against each one of them. There was, therefore, nothing whatever improper in the conduct of the preliminary enquiry in this case and, with some minor exceptions, the evidence led was evidence which was admissible against one or the other of the two accused then before the Court. It happened, however, that the greater portion of the evidence given at the preliminary enquiry was evidence which, although admissible against the accused Othman with regard to the alleged extortion, was not admissible against the appellant upon any charge whatsoever. It does not appear to have occurred to the learned District Judge, when he took the course he did of dealing differently with the two accused before him, that when he came himself to try the appellant he would have to be very careful, in reaching his decision, to ignore the large volume of evidence which had been given as against Othman but which was inadmissible as against the appellant. I have searched the record in vain to discover some indication that this danger was present to the mind of the learned District Judge at any time during the trial against the appellant. On the other hand, I find in his grounds of decision the following statement :—

The remainder of the evidence did not incriminate this appellant but did establish beyond doubt the fact that Ramalingam was abducted and wrongfully confined for about 12 hours.

On a careful study of the evidence I am satisfied that such a definite finding could not be reached upon the evidence admissible against the appellant alone. There is evidence that Ramalingam between 7 and 7.30 a.m. was led away from the Mine's Office with hands tied behind his back and in a direction variously referred to as that of the river or of the road. There is also evidence that at 7.30 p.m. Ramalingam returned home. There is, however, no evidence whatsoever as to what he was doing in the meantime other than hearsay evidence, and inference. It is consistent with the admissible evidence that he was released much earlier.

I think the learned District Judge committed an error of judgment in separating the trials of the two accused after having heard a joint preliminary enquiry. In such cases, where it becomes necessary to commit one accused, it is more satisfactorily to commit both together even though the charge against one is a less serious one. I conclude, moreover, that in reaching his decision to convict the appellant the learned District Judge did not appreciate the importance of basing his decision only upon the evidence properly admissible against the appellant and I am, therefore, of opinion that, not having this necessity in mind, he did in fact take into consideration as against the appellant a large body of evidence which was not properly admissible against him. This is the point of substance raised in the first ground of appeal.

The fourth ground of appeal raised, which I will deal with next, is that the learned District Judge erred in his application of the law to the facts disclosed in the evidence. Under the heading Mr. Mahendran pointed out that even the admissible evidence on the record was not satisfactory, that the learned District Judge took too favourable a view of it. For example, in the grounds of decision it is stated, in reference to the witness Vivekanandan, that "this witness was not shaken in cross-examination." Mr. Mahendran pointed out that whereas in examination in chief this witness stated that the appellant assisted in tying up Ramalingam, in cross-examination he stated that although the appellant was there he was *not* assisting in tying up the hands of Ramalingam. It is also to be observed that whilst the witness Vivekanandan states that Ramalingam was taken away by "6 or so Chinese" including the appellant, two other witnesses are quite definite that Ramalingam was led away by two Chinese with the appellant following them. No mention of this discrepancy is made in the learned District Judge's grounds of decision. It was also argued that there was insufficient evidence in regard to the intention.

The third ground of appeal calls for little comment. The learned District Judge was not impressed with the appellant's defence of an *alibi* and I find no reason to criticise his view on this point.

The second ground of appeal reads as follows :—

The long delay in delivering the grounds of judgment after the lapse of two years is unsatisfactory and has prejudiced your Petitioner in his appeal.

It is difficult to judge whether the delay referred to can be said, in fact, to have prejudiced the appellant with regard to his appeal. On the one hand the delay may, in one respect, have assisted the appellant in that

any Criminal Court must listen with considerable sympathy to an accused person whose appeal has been delayed through no fault of his own for two years. On the other hand, I have no means of knowing when the grounds of decision in this case were in fact written. Mr. Mahendran stated from the Bar that he received the grounds of decision under cover of a letter from the Court dated 3rd February, 1949 and, of course, I accept this statement. I have no means of telling, however, whether the whole of the delay was in writing the grounds of decision or in despatching them. I think I must assume in favour of the appellant that the grounds of decision were in fact written not long before the 3rd of February, 1949. If this be the case there is at least some possibility of prejudice to the appellant, because in writing grounds of judgment so long after the hearing it is possible that the learned District Judge may have omitted to state something in those grounds which might have been favourable to the appellant.

However this may be, it is obvious that the appellant has been gravely prejudiced in other respects by having for two years been left in doubt as to whether or not his conviction was to stand, and I feel bound, in the interests of justice, to comment upon the delays that have occurred in every stage of this unfortunate case. The fact that the appellant in this case was not arrested until over a year after the alleged offence was not, as far as I can judge, the fault of the appellant himself. Very often accused persons cannot be found for the good reason that they do not want to be found. But this appellant was an employee of Petaling Tin Mine; the offence was committed at the Petaling Tin Mine; the appellant was arrested there; and there is nothing whatsoever to suggest that he could not be found there at any time from the date of the alleged offence until the date of his arrest. Indeed the Assistant Superintendent of Police who gave evidence at the preliminary enquiry said that the delay had been caused by changes in administration and that the Army Officers could obtain insufficient evidence.

I am prepared to assume that the delay which occurred up till the trial of this appellant was due to the difficulties in proceeding speedily with the investigation of crimes during the British Military Administration period owing to the acute shortage of staff and other administrative difficulties. But whatever the causes of delay may have been the fact remained that at the time of the trial the witnesses were giving evidence of events which had occurred some twenty months earlier. This, in itself, is a matter upon which the learned District Judge should, in my view, have directed himself; but we have no means of knowing whether or not he took this point into consideration nor whether it was present to his mind that the principal witness, Vivekanandan who was thirteen years old at the date of the trial had been only about eleven years old at the date of the offence.

The delay in bringing the appellant to trial was regrettable. But the delay since the trial in the hearing of this appeal, which was due solely to the inability of the appellant to obtain the grounds of decision of the learned District Judge was, in my opinion, wholly inexcusable. Sub-section (3) of section 307 of the Criminal Procedure Code lays down that when a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate and solicitor. No time limit is, of course, laid down in which the Court shall serve such grounds of decision, and it is quite obvious it would be impossible to lay down any hard and fast time limit by any provision of law. After hearing a long and complicated case, particularly one in which difficult points of law had arisen, a Magistrate might require a considerable time in which to study the authorities and in which to set down on paper the grounds of a decision the reasons for which might be complicated. In a simple and straightforward case, however, the hearing of which does not last more than one day and in which no difficult question of law arises there is no reason, in my view, why grounds of decision should not be written immediately upon receipt of the notice of appeal. The interval between notice of appeal and delivery of grounds of decision should, in such a case, be a matter of days, not weeks, much less months. Indeed there is a very good reason from the Magistrate's point of view why grounds of decision should always be written as promptly as possible. The sooner, after hearing the witnesses the grounds of decision are written the clearer in the mind of the Magistrate who writes them will be all the details of the evidence, the demeanour of the witnesses and the general atmosphere of the case. Where delay occurs, not only have important details faded from the mind of the Magistrate who tried the case, but also additional work is involved as the whole case has to be studied afresh in order to bring the matter back to mind. In my opinion, the fact that no time limit is laid down by law for giving grounds of decision increases the responsibility of Judges and

Magistrates to see that no undue delay occurs and that the spirit of the law rather than its letter is complied with.

In view of the confusion between the admissible and the inadmissible evidence; of the fact that the admissible evidence does not appear to have been as unassailable as the learned District Judge appeared to have thought; and of the possibility of prejudice to the appellant through the long delay in writing the grounds of decision, it is impossible for this conviction to stand. The learned Deputy Public Prosecutor who conducted the appeal did not press for an order for a re-trial in the event of my quashing the conviction and in the circumstances it would, in my opinion, be a grave injustice to the appellant to order a re-trial after all these years. I, therefore, quashed the conviction and sentence.

Appeal allowed.

WONG KIM WAH v. PUBLIC PROSECUTOR

[C. A. (Willan C.J., Pretheroe and Spenser Wilkinson JJ.) March 10, 1949]

[K. L. — F.M. Criminal Appeal No. 26 of 1949]

Penal Code, s. 396 — Gang robbery with murder —Whether proof of common intention is necessary.

In this case the appellant was charged that on June 16, 1948, he committed gang robbery and that in the commission of the said gang robbery murders were committed by one of the gang robbers and that he thereby committed an offence under s. 396 of the Penal Code. In directing the assessors the learned trial Judge said in effect that the accused could be guilty if there was a common intention to commit the robbery.

Held: the guilty act of a gang robber who commits murder in the case of a gang robbery is imputed to all the others who conjointly commit the gang robbery and there is, therefore, no need in such a case to have recourse to section 34 of the Penal Code or to consider the question of common intention.

Cases referred to:—

(1) *Public Prosecutor v. Abu Aman bin Duin & Ors.* Selangor Criminal Trial No. 51 of 1947 — Unreported.

(2) *Rex v. Yeo Kim Watt & Anor.* (1946) M.L.J. 155.

COURT OF APPEAL (CRIMINAL).

The judgment of the Court of Appeal was delivered by:—

Spenser Wilkinson J.: — The appellant was charged that on the 16th June, 1948, at Sungei Siput North he committed gang robbery and that in the commission of the said gang robbery murders were committed by one of the gang robbers and that he thereby committed an offence punishable under section 396 of the Penal Code. In directing the assessors upon the law relating to this charge the learned trial Judge said:—

"What he is charged with is participating in a gang robbery in the course of which murders were committed, and I must tell you that it is the law of this country that when a gang of people (that is five or more people) have a common intention to commit robbery (that is stealing by the use of force or by the threat of death) and in the course of carrying out that purpose a murder is committed, then every man who is a member of the gang and has gone to the scene in pursuance of the purpose of the gang, is guilty of an offence irrespective of whether or not it is he who actually commits the act of murder which is done."

We think there is no doubt that this direction was too favourable to the accused. It is in our view settled law in this country that proof of common intention is not necessary upon a charge under section 396 of the Penal Code. In *Public Prosecutor v. Abu Aman bin Duin & Ors.*[1] the following passage appears:—

"As I have already stated, in my opinion the evidence of a common intention to break into this house during the night was clear. The provisions of s. 460, however, do not make it necessary to go so far as to find a common intention to cause death or grievous hurt, and the liability to the higher penalty imposed by this section depends not upon common intention but upon the words in the section, 'every person jointly concerned in committing . . . such housebreaking by night'."

In that case the accused appealed and their appeal was dismissed. Whilst that was a decision on section 460 of the Penal Code we are of opinion that the same principles apply to section 396.

In *Rex v. Yeo Kim Watt & Anor.*[2] the Court of Criminal Appeal in the course of a judgment dealing with the question whether section 34 could apply to sections 392 and 393 said:—

" . . . . there is no need to have recourse to s. 34 in considering s. 394 because under that section the guilty act of the robber who causes hurt in committing the robbery is imputed to all the others who are jointly concerned in the commission of the robbery, and it would not avail any one of the others to say he had nothing to do with the causing of such hurt. We might add that a similar liability attaches itself to each member of the gang under s. 396 when one of such members commits murder during the actual gang robbery."

It follows from this that the guilty act of a gang robber who commits murder in the case of a gang robbery is imputed to all the others who conjointly commit that gang robbery and there is, therefore, no need in such a case to have recourse to section 34 or to consider the question of common intention.

As the appellant in the present case was convicted in spite of the view of the law expressed by the learned trial Judge the decision in this appeal could not be affected thereby and the appeal was accordingly dismissed.

Appeal dismissed.